

AS.(MD)Nos.53 of 2019 & 174 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Reserved On : 07.03.2025

Pronounced On : 24.04.2025

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
AND
THE HON'BLE MR.JUSTICE M.JOTHIRAMAN**

A.S.(MD)Nos.53 of 2019 & 174 of 2021

A.S.(MD)No.53 of 2019

M/s.I.K.Construction,
Rep.by its Proprietor,
I.Kezhson, S/o.Issac,
No.14/109-A, Azhagiapandiapuram,
Thadikkarankonam Village,
Thovalai Taluk,
Kanyakumari District

... Appellant/Plaintiff

Vs.

1.M/s.Sathyam Educational Trust,
Rep.by its Chairman,
A.Thinagar, S/o.Athisayaraja,
No.35/B5, Anitha Illam,
Saragunaveethi North,
Nagercoil, Nagercoil Village,
Agastheeswaram Taluk,
Kanyakumari District.

2.T.Athisayaraja
3.A.Thanalakshmi
4.A.Kanimozhy

... Respondents/Defendants



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure against the Judgement and Decree dated 28.04.2018 made in O.S.No.124 of 2012 on the file of the District Judge, Kanyakumari District at Nagercoil.

For Appellant : Mr.S.R.Rajagopal,
Senior Counsel,
for Mr.Puhzh Gandhi

For R1 : Mr.Veerakathiravan,
Senior Counsel,
for Mr.M.P.Senthil

For R2 & R3 : No Appearance

A.S.(MD)No.174 of 2021

1.M/s.Sathyam Educational Trust,
Rep.by its Chairman,
A.Thinagar,
S/o.Athisayaraja,
No.35/B5, Anitha Illam,
Saragunaveethi North,
Nagercoil, Nagercoil Village,
Agastheeswaram Taluk,
Kanyakumari District.

2.T.Athisayaraja

3.A.Thanalakshmi

4.A.Kanimozhy

... Appellants/Defendants

Vs.



AS.(MD)Nos.53 of 2019 & 174 of 2021

M/s.I.K.Construction,
Rep.by its Proprietor,
I.Kezhson, S/o.Issac,
No.14/109-A, Azhagiapandiapuram,
Thadikkarankonam Village,
Thovalai Taluk,
Kanyakumari District.

... Respondent/Plaintiff

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure against the Judgement and Decree dated 28.04.2018 made in O.S.No.124 of 2012 on the file of the District Judge, Kanyakumari District at Nagercoil.

For Appellants : Mr.Veerakathiravan,
Senior Counsel,
for Mr.M.P.Senthil

For R1 : Mr.S.R.Rajagopal,
Senior Counsel,
for Mr.Puhazh Gandhi

COMMON JUDGMENT

(Judgment of this Court was delivered by **M.JOTHIRAMAN J.**)

The plaintiff preferred an appeal in AS.(MD)No.53 of 2019 to set aside and modify the judgment and decree dated 28.04.2018 passed in O.S.No.124 of 2012. Unsuccessful defendants have preferred an appeal



AS.(MD)Nos.53 of 2019 & 174 of 2021

in AS.(MD)No.174 of 2021 to set aside the judgment and decree dated 28.04.2018 passed in O.S.No.124 of 2012.

WEB COPY

2.For the sake of convenience, the parties are referred to as their rank before the trial Court.

3.The plaintiff, ie., M/s.I.K.Construction, represented by its Proprietor, I.Kezhon, has been filed a suit for recovery of money of Rs.2,67,88,900/-, Rs.31,40,400/- and Rs.11,48,700/- with future interest at the rate of 12% per annum from the date of last demand till the date of realization and cost. The suit was decreed by the learned District Judge vide judgment dated 28.04.2018 with cost and the defendant was directed to pay a sum of Rs.3,10,78,000/- (less Rs.25,00,000/- which was paid as per order of Hon'ble High Court) with future interest at the rate of 6% per annum from the date of suit till the date of realization. Aggrieved over the same, the plaintiff challenging the portion of the decree, in respect of 6% interest to the principal amount, appeal in AS.(MD)No.53 of 2019 has been filed. Aggrieved over the decree and judgment, the defendants have preferred an appeal in AS.(MD)No.174 of 2021.

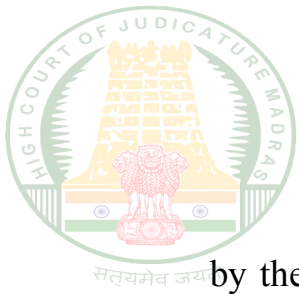


AS.(MD)Nos.53 of 2019 & 174 of 2021

4. The case of the plaintiff in brief as follows:-

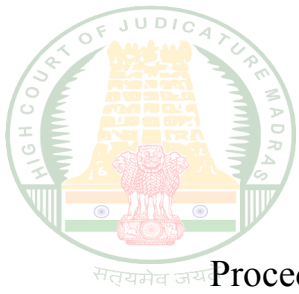
WEB COPY

The plaintiff is the proprietor of M/s.I.K.Construction and the first defendant is the Chairman of the Sathyam Educational Trust. They entered into three separate construction agreement dated 29.08.2008. As per the agreement, the main building first block ground floor, first floor and second floor at the rate of Rs.650/-, Rs.700/- and Rs.800/- per square feet respectively. Office building ground floor and first floor at the rate of Rs.700/- and Rs.800/- per square feet respectively. Main building second block ground floor, first floor and second floor at the rate of Rs. 650/-, Rs.700/- and Rs.800/- per square feet respectively. The total amount for construction of main building first block consisting of ground floor, first floor and second floor is Rs.3,54,88,900/-. On 29.08.2008, a sum of Rs.25,00,000/-, on 20.09.2008 a sum of Rs.15,00,000/- and on 09.01.2010, a sum of Rs.47,00,000/- was paid by the first defendant for the main building. The balance amount is Rs.2,67,88,900/-. Similarly, the first defendant paid cost of construction, ie., Rs.10,00,000/- for constructing office building on 29.08.2008 and on 20.09.2008 a sum of Rs.20,00,000/- was paid. Totally a sum of Rs.30,00,000/- was paid and balance amount is Rs.31,40,400/-. The said balance amount to be paid



AS.(MD)Nos.53 of 2019 & 174 of 2021

by the first defendant for construction of main building second block is Rs.11,48,700/-. The first defendant issued three cheques dated 15.10.2009 and the same were dishonoured by the Bank. Subsequently on 09.01.2010, the first defendant has paid a sum of Rs.47,00,000/-. The plaintiff had completed the construction work for a sum of Rs.4,53,03,000/-, but the first defendant has paid only a sum of Rs.1,42,25,000/-. As such, an amount of Rs.3,10,78,000/- is illegally retained by the defendant. The defendant attempted to complete the construction work with the help of the third party. Hence, the plaintiff initially filed a suit in O.S.No.392 of 2010 for the relief of permanent injunction. In the above suit, status-quo was granted, challenging the same, the first defendant had preferred a revision before this Hon'ble Court in CRP.(MD)Nos.2734 & 2753 of 2010 to struck off the said plaint. In the course of hearing of CRP, an Advoate Commissioner was appointed to look into the construction work already finished by the plaintiff. The Commissioner filed a report on 15.02.2011. In the earlier suit, status-qua was granted and subsequently it was stayed by this Hon'ble Court. Now, the plaintiff's construction work is stopped. Hence, the present suit is not hit by Order II Rule 2 of the Code of Civil

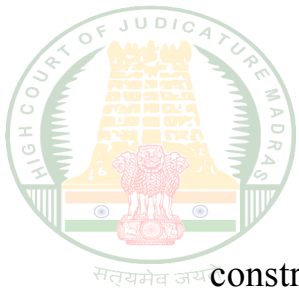


AS.(MD)Nos.53 of 2019 & 174 of 2021

Procedure. Therefore, the plaintiff is entitled for recovery, a sum of Rs. 3,10,78,000/- from the defendants with interest at the rate of 12% per annum from the date of plaint till the date of realization. Hence, the suit.

5. Brief averments stated in the written statement filed by the first and second defendants are as follows:-

The first defendant has admitted the agreements and as per the terms of the agreements, entire construction work should be completed, within six months, so as to enable the first defendant to commence the educational activities from the academic year 2009-2010. The first defendant has admitted that he has paid a sum of Rs.55,00,000/- on 29.08.2008 and a sum of Rs.40,00,000/- on 20.09.2008 respectively. The plaintiff has not specifically mentioned the date of completion of the construction work in the plaint averments. The plaintiff had failed to complete the construction work within the time fixed in the construction agreement and thereby committed breach of contract. Thereafter, the first defendant engaged a new contractor to continue the construction work and complete the work in respect of two buildings. The plaintiff remained silent and while the first defendant has proceeded with



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

construction work by engaging new contractor. Moreover, the plaintiff has also received a sum of Rs.47,00,000/- on 09.01.2010 towards full and final settlement. After receipt of the above said amount plaintiff started demanding huge lump sum towards settlement. The plaintiff filed complaints under Section 138 of the Negotiable Instruments Act, 1881 against the first defendant in C.C.Nos.240, 241 and 242 of 2010. At the instigation of the plaintiff, his friend one Boothalingam Pillai, also filed a complaint under Section 138 NI Act in C.C.Nos.198 and 209 of 2010. As per clause 6 of the construction agreement dated 29.08.2008, after the completion of work, the contractor has to serve written notice to the defendant to conduct joint survey. But the plaintiff did not make any request to conduct joint survey. The plaintiff already filed a suit in O.S.No.392 of 2010 seeking permanent injunction. The plaintiff failed to claim the balance amount in the prior suit itself. Therefore, the subsequent suit is hit by Order II Rule 2 of Code of Civil Procedure. Hence, the suit is liable to be dismissed with costs.

6. Based on the above pleadings, the trial Court has framed the following issues:-



WEB COPY

1. Whether the plaintiff and defendant entered into three agreements for construction of building for Satyam College of Engineering at Kumarapuram, Aralvoimozhy?

2. Whether the defendant breached the contract and failed to pay the payment periodically to the plaintiff?

3. Whether the plaintiff was lethargic and slow in carrying of the construction work?

4. Whether the defendants have engaged new contract to complete the construction work?

5. Whether the suit is barred under Order 2, Rule 2 of CPC?

6. Whether the plaintiff is entitled to recover a sum of Rs.2,67,88,900/- with future interest at the rate of 12% per annum in respect of the main building first block ground floor, first floor and second floor?

7. Whether the plaintiff is entitled to recover a sum of Rs.31,40,400/- with future interest at the rate of 12% per annum in respect of the office building ground floor?

8. Whether the plaintiff is entitled to recover a sum of Rs.11,48,700/- with future interest at the rate of 12% per annum in respect of the main building second block ground floor?

9. To what relief, if any, the plaintiff is entitled?



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

7.On the side of the plaintiff, plaintiff himself examined as P.W.1, Thiru.Navaretnam was examined as P.W.2 and Thiru.R.Lingarajan was examined as P.W.3 and Ex.A1 to Ex.A45 and Ex.X1 were marked. On the side of the defendants, the first defendant himself examined as D.W.1 and Thiru.S.Murugan was examined as D.W.2 and Ex.B1 to Ex.B60 were marked.

8.Findings of the trial Court:-

- i)The suit is not barred under Order II Rule 2 CPC.
- ii)The first defendant was defaulted to pay construction cost as per terms of the construction agreements.
- iii)The plaintiff was continued construction work till 09.04.2010 merely on basis of dishonoured cheques and the main building were fully constructed by the plaintiff.
- iv)The Commissioner's report filed in M.P.No.1 of 2011 in CRP. (MD)No.2753 of 2010 is also supported to the case of the plaintiff.
- v)The first defendant himself admitted the claim amount, as per Ex.A33.
- vi)The case of the plaintiff has been proved through the evidence of P.W.2 and P.W.3.



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

9.Points for determination arises in these appeals is that

- i)Whether the plaintiff has put up the construction as claimed for?
- ii)Whether the first defendant has put up the construction as claimed for?
- iii)Whether the plaintiff is breached the contract as per the agreements in Ex.A1 to Ex.A3?
- iv)Whether the defendant/trust breached the contract and failed to pay the payment periodically to the plaintiff?
- v)Whether the plaintiff is entitled to recover the money as prayed for in the suit?

10.The learned Senior Counsel appearing for the appellants/defendants in A.S.(MD)No.174 of 2021 and first respondent / first defendant in A.S.(MD)No.53 of 2019 would submit that the initial onus of proof was not discharged by the plaintiff on the basis of the evidence. No bills or invoice for procuring materials have been produced. No bank transactions have been produced to substantiate the payments made to the dealers of cement, bricks, iron rods and other raw

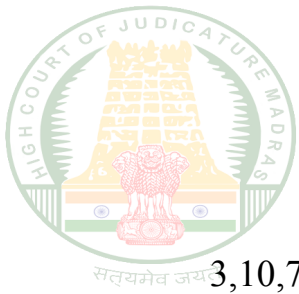


AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

materials. He would further submit that no documentary evidence were produced to substantiate the payments made to the masons, labours and other workmen for completion of the construction. The trial Court completely failed to consider the core issue that who has put up the construction, there is no issue has been framed to that effect. No adequate evidence or materials placed before the Court to claim huge amount of Rs.3,10,78,000/- and absolutely no breakups have been filed.

11.The learned Senior Counsel further would submit that with regard to the first block in the main building, a huge claim of Rs. 1,31,65,300/- has been made as if the entire construction has been over in the second floor, but the Commissioner's report marked as Ex.A18 completely falsifies the case of the plaintiff. With regard to the second block in main building, ground floor itself has not been completed and there is no basis for claiming a sum of Rs.36,73,700/-. There is absolutely no material particulars in the plaint in O.S.No.392 of 2010 as well as the subsequent suit in O.S.No.124 of 2012 relating to the date of completion of the construction. In O.S.No.392 of 2010, the plaintiff has taken a stand that the amount due from the first defendant is Rs.



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

3,10,78,000/- and there is no specific averment relating to the stage of the construction as well as the work done by the plaintiff. The plaintiff has not come with clean hands and he has produced false evidence and also made false claims. In spite of specific date stipulated to complete the construction, the plaintiff has not discharged his part of performance and he did not proceed with the construction as per the terms of the contract. The plaintiff has not sent any notice to the first defendant as per the Clause 5 of the terms and conditions of the construction contract. The trial Court completely over-looked that the first defendant wanted to start the Engineering College for the academic year 2009-2010. Only in such circumstances, the time for completion of construction was fixed as six months ie., on or before 01.03.2009. The plaintiff categorically admitted that he did not complete the construction work as per the construction agreement. The plaintiff has produced Ex.A26 to substantiate as if the materials were transported through vehicles. However, the said documents have been proved to be false and fabricated one by production of Ex.B57. To strengthen his contention, he has relied upon the following judgments reported in

(i)2019 (6) SCC 2 in Jagadish Prasad Patel (Dead) through



AS.(MD)Nos.53 of 2019 & 174 of 2021

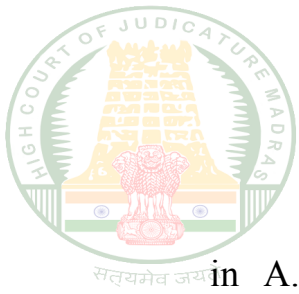
WEB COPY

Legal representatives and another Vs. Shivnanth and others to show the burden always lies on the plaintiff to make out and establish a clear case for granting relief and the weakness, if any on the case set up by the defendants would not be a ground to grant relief to the plaintiff.

(ii) ***2013 (15) SCC 161 in Sebastiao Luis Fernandes (Dead) through Lrs & Ors. Vs. K.V.P.Shashtri (Dead) through Lrs & Ors*** to show that in terms of Section 102 of the Indian Evidence Act, the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any which would disentitle the plaintiff to the same.

(iii) ***1998 (4) SCC 539 in Panjab Urban Planning & Development Authority Vs M/S Shiv Saraswati Iron & Steel Re-Rolling Mills*** to show that the plaintiff must succeed or fail on his own case and cannot take advantage of weakness in the defendant/respondent's case to get a decree.

12.Per contra, the learned Senior Counsel appearing for the appellant / plaintiff in A.S.(MD)No.53 of 2019 and respondent / plaintiff



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

in A.S.(MD)No.174 of 2021 would submit that the plaintiff had originally filed a suit in O.S.No.392 of 2010 for bare injunction restraining the defendant trust from engaging any other contractor to carry out remaining construction work unless balance amount due to the plaintiff is duly settled. Thereafter, based on the cause of action for recovery of dues under Ex.A1 to Ex.A3 and for damages, suit in O.S.No. 124 of 2012 has been filed. The cause of action in the suit O.S.No.124 of 2012 is independent and there is no question of O.S.No.124 of 2012 being hit by Order II Rule 2 of the Code of Civil Procedure. The defendant had filed an Interlocutory Application in I.A.No.546 of 2012 in O.S.No.124 of 2012 to reject the plaint on the very same ground that the suit is hit by Order II Rule 2 CPC and the said application was dismissed by an order dated 15.12.2013 and the same was become final.

13.It is an admitted fact that the plaintiff and the first defendant have entered into three agreements dated 29.08.2008 under Ex.A1 to Ex.A3. The first defendant has also admitted that he had paid a sum of Rs.55,00,000/- on 29.08.2008 and Rs.40,00,000/- on 20.09.2008. Ex.A1 to Ex.A3 agreements entered between the parties for construction of



WEB COPY

three buildings namely main building-first block, consisting ground floor, first floor and second floor and office building consisting ground floor and main building-second block, consisting ground floor, first floor and second floor. In clause 5 of Ex.A1 to Ex.A3, it has been clearly set out that the construction will be completed in six months with the terms and conditions set out there. Clause 5 clearly states that 20% payment shall be made on commencement of work and thereafter 20% at each stage of progress in construction work. There is no whisper anywhere in the written statement that the first defendant has paid the amounts as per Ex.A1 to Ex.A3. Following table is the break-up of amounts:

Exhibit	Total Amount (in Rs.)	20% (in Rs.)
A1	3,54,88,900	70,97,780
A2	3,54,88,900	70,97,780
A3	1,31,58,000	26,31,600
Total	8,41,35,800	1,68,27,160

D.W.1 admits that 20% advance amount is payable under Ex.A1 to Ex.A3 and that only a sum of Rs.55,00,000/- has been paid by him to the plaintiff on the date of agreements. Admittedly, the first defendant has not paid the amount of Rs.1,68,27,160/-



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

14. According to the plaintiff, balance amount payable to him as mentioned in the plaint is as follows:-

A. Main Building First Block

Ground Floor 16536 sq.ft*650	- Rs.1,07,48,400.00
First Floor 16536 sq.ft*700	- Rs.1,15,75,200.00
Second Floor 16536 sq.ft*800	- Rs.1,31,65,300.00

Main Building Payment:

29.08.2008	- Rs.25,00,000.00
20.09.2008	- Rs.15,00,000.00
09.01.2010	- Rs.47,00,000.00
Total	Rs.87,00,000.00

Balance	Rs.2,67,88,900.00

B. Office Building works completed

Ground Floor 8772 sq.ft * 700 -Rs.61,40,400.00

Advanced of payment in different date

29.08.2008	Rs.10,00,000/-	
20.09.2008	Rs.20,00,000/-	-Rs.30,00,000.00

Balance		-Rs.31,40,400.00

C. Main Building Second Block

Ground Floor on construction
work not yet completed -Rs.36,73,700.00

Advanced of payment in different date

29.08.2008	Rs.20,00,000/-	
20.09.2008	Rs.5,25,000/-	-Rs.25,25,000.00



WEB COPY



AS.(MD)Nos.53 of 2019 & 174 of 2021

Balance Rs.11,48,700.00

Balance Payment

A) Main Building First Block	Rs.2,67,88,900.00
B) Office Building	Rs. 31,40,400.00
C) Main Building Second Block	Rs. 11,48,700.00

Total	Rs.3,10,78,000.00

It is also the case of the plaintiff that against the balance payable, the defendant made partial payments by the below mentioned cheques.

1.Cheque No.105869 dated 15.10.2009	-Rs.25,78,000.00
2.Cheque No.105870 dated 15.10.2009	-Rs.20,00,000.00
3.Cheque No.105871 dated 15.10.2009	-Rs.20,00,000.00

15.As per terms of the agreement, entire building, ie., three buildings are to be constructed within six months from the date of agreement dated 29.08.2008, which means it has to be completed by 28.02.2009. According to the plaintiff, aforesaid three cheques were dishonored and the defendant requested the plaintiff to continue the construction work and subsequently, on 09.01.2010, the defendant has paid a sum of Rs.47,00,000/- to the plaintiff for which a separate receipt issued wherein both plaintiff and the defendant had signed. On the other hand, there is no denial in the written statement. However, it was argued

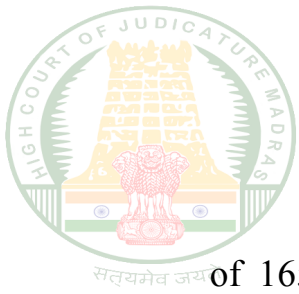


AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

that the payment of Rs.47,00,000/- was made towards full and final settlement. To prove the said fact, there is no pleadings and evidence and the same is not acceptable one.

16.A perusal of Ex.A1 to Ex.A3 agreements reveals that there is no mention about the total area to be constructed or even there is no mention about the approximate total area to be constructed. Ex.A7 is the legal notice issued by the plaintiff to the first defendant dated 17.04.2010 wherein it has been stated that the cheque dated 15.10.2009 bearing No. 105869 for a sum of Rs.25,78,000/- has been dishonoured. Ex.A7 to Ex.A9 are the legal notices issued by the plaintiff to the first defendant for the issuance of above said three cheques, which have been dishonoured and calling upon the first defendant to pay the amount. Ex.A13 is the copy of the plaint in O.S.No.392 of 2010 on the file of the Subordinate Court, Nagercoil wherein it has been stated that the plaintiff completed the main building first block ground floor work having area of 16536 sq.ft of construction and 16530 sq.ft of construction in the first floor and 16536 sq.ft of second floor. It is also stated that the plaintiff completed construction work in the main building second block and area



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

of 16530 sq.ft and the plaintiff completed and as such a sum of Rs. 3,10,78,000/- is illegally retained by the defendant. Further, it has also been stated about the aforesaid three cheques issued by the first defendant and all three cheques were dishonoured and the proceedings under Section 138 of the Negotiable Instruments Acts is also pending before the Judicial Magistrate No.2, Nagercoil. In Ex.A13, there is no whisper about the fact narrated in the plaint in O.S.No.124 of 2012 and on 09.01.2010, the defendant has paid Rs.47,00,000/- to the plaintiff, for which, separate receipt obtained and both were signed on it. Similarly in the plaint in O.S.No.124 of 2012, it has been pleaded that the plaintiff completed the construction work for a sum of Rs.4,53,03,000/- and the defendant has paid only Rs.42,22,000/- and remaining balance of Rs. 3,10,78,000/-, whereas in Ex.A13, there is no mention about the aforesaid facts.

17.The learned Senior Counsel appearing for the respondent / plaintiff in A.S.No.174 of 2021 and the appellant / plaintiff in A.S. (MD)No.53 of 2019 would submit that the important document is Ex.A33 agreement of settlement dated 02.06.2014 wherein the defendant has admitted his liability. The execution and attestation of Ex.A33 has



AS.(MD)Nos.53 of 2019 & 174 of 2021

been proved in a manner known to law. There is no pleading denying Ex.A33 and nothing has been elicited in cross examination regarding Ex.A33.

18.The Notary Public, who notarized the document in Ex.A33, namely, Mr.Navaratnam has been examined as P.W.2. P.W.2 speaks about the execution of Ex.A33 and another document signed by D.W.1 for some other transaction on the same day as Ex.A33, which document has been marked as Ex.X1. To prove the execution of the document, P.W.3 one R.Lingarajan attesting witness has also been examined.

19.The learned Senior Counsel appearing for the defendant would submit that the alleged Ex.A33 compromise deed dated 02.06.2014 was obtained by way of coercion. The plaintiff with an intention to criminally intimidate the first defendant, lodged a false complaint dated 09.04.2014, which resulted in registering case in Cr.No.22 of 2014 by the Anti-Land Grabbing Special Cell/DCB, Nagercoil. Based on the said complaint, the Police authorities arrested the appellant/defendant and he came out on bail on 16.05.2014 and appeared before the jurisdictional



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

police station regularly from 27.05.2014 till 02.07.2014. During that period, the plaintiff with an aid of Police authorities coerced the defendant and obtained his signature. He would submit that the plaintiff has not taken steps to amend the plaint to incorporate the subsequent events in the pleadings. Therefore, in the absence of any pleadings, the alleged compromise agreement cannot be looked into for any purpose.

20.If the above submission advanced by the learned Senior Counsel is accepted, then the plaintiff ought to have file a petition to record the compromise before the trial Court. Admittedly, no step was taken by the parties to settle the issue. More over, Ex.A33 came to be existence after filing of this suit. In such circumstances, there cannot be a full reliance on the document alone. According to the plaintiff, with regard to the first block in main building claim a sum of Rs.1,31,65,300/- has been made, as if the entire construction has been completed in second floor. However, in Commissioner report Ex.A18, it has been mentioned that compared to ground and first floor portions in main building first block, the second floor constitution is on recent origin.



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

21.It is not stated in the plaint about the date of completion of construction work either in the plaint in O.S.No.124 of 2012 or in the plaint in O.S.No.392 of 2010 or in the notice issued by the plaintiff in Ex.A7 to Ex.A9. However, Ex.A33 compromise agreement dated 02.06.2014 it has been mentioned that the plaintiff has completed his work on 10.04.2010. It is not stated on which date each stage of the construction has been completed in respect of three buildings. Ex.A26 has been relied upon to show that he transported materials in those vehicles. The said documents have been proved as false by Ex.B 57 by the defendant's side. There is no material placed to prove the procurement of materials, amount spent for the purchase of materials as well as the amount spent for labour charges. There is no explanation on the part of the plaintiff for completing entire construction work with respect to the main building first block without receiving payment for completing each level of construction. As per clause 5 of the construction agreement dated 29.08.2008, which itself shows that the plaintiff failed to complete the construction work as per the agreement.



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

22.It is not the case of the plaintiff that he has sent notice to the first defendant to clear payment on completion of each level described in clause 5 of the terms of the construction contract. It is the case of the plaintiff that he has completed construction work in main building first block and office building. However, the plaintiff did not issue notice to the first defendant to conduct joint survey within 7 days as per clause six of the construction agreement. A perusal of the Ex.A19, copy of the building plan which has been relied by the plaintiff, would show that the plaintiff has not completed the construction work as per the construction agreement. The plaintiff has not pleaded anything about Ex.A26 which consists book maintained by the plaintiff regarding money transaction with the defendant and various bills.

23.The plaintiff had originally filed a suit in O.S.No.392 of 2010 on the file of the Subordinate Court, Nagercoil for bare injunction, restraining the defendant/trust from engaging any other contractor to carry out remaining construction work unless balance amount due to the plaintiff is duly settled or until contract is lawfully cancelled. It is relevant to extract Order II Rule 2 CPC as hereunder:-



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

(2)Relinquishment of part of claim.—Where a plaintiff

omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

It is pertinent to mention that based on the cause of action for dues under Ex.A1 to Ex.A3 agreements, the plaintiff has chosen to file a suit O.S.No.124 of 2012. The cause of action for the suit in O.S.No.124 of 2012 is independent and there is no question of O.S.No.124 of 2012 is being hit by the Order II and Rule 2 of the Civil Procedure Code. It is also pertinent to mention that the defendant has filed I.A.No.546 of 2012 in O.S.No.124 of 2012 to reject the plaint on the very same ground that the suit is hit by the Order II Rule 2 CPC and the said application was dismissed by the trial Court by an order dated 15.12.2013.

24.The college was opened by the first defendant on 24.08.2009. As per Ex.A41, the plaintiff had caused a paper advertisement in Daily Thanthi newspaper. It is the specific case of the plaintiff that after the college opening function, the first defendant had handed over three cheques Ex.A4 to Ex.A6 for a sum of Rs.65,78,000/- dated 15.10.2009 and had requested to present the cheques after his instructions.

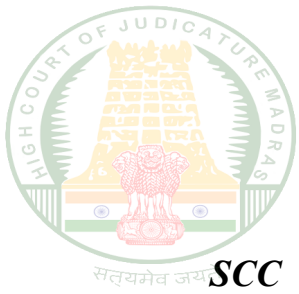


AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

According to the plaintiff, on 09.01.2010, the first defendant paid a sum of Rs.47,00,000/- to the plaintiff and the same is pleaded in the plaint. There is no denial in the written statement. The cheque issued by the first defendant under Ex.A4 to Ex.A6 were returned unpaid and the plaintiff chosen to file a criminal cases before the learned Judicial Magistrate, Nagercoil under Ex.A10 to Ex.A12.

25.The learned Senior Counsel appearing for the plaintiff would submit that the plaintiff continued the work without any payment from the defendant. The learned Senior Counsel to strengthen his contention, he has relied upon the judgment reported in **2006 5 SCC 588** in a case of **Anil Rishi Vs. Gurbaksh Singh** to show that in terms of Section 102 of the Indian Evidence Act, the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same. The learned Senior Counsel would further submit that any amount of evidence without pleadings is inadmissible. To strengthen his contention, he has relied upon the decision of the Hon'ble Supreme Court reported in **(2018) 11**



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

SCC 119 in a case of **Ratanlal Vs. Sundarabai Govardhandas**

Samusuka to show that the parties to a suit are always govern by their pleadings, any amount of evidence or proof adduced without there being proper pleadings, is had no and will not come rescue of the parties.

26. According to the plaintiff, the 1st defendant admits non-payment and the plaintiff and the first defendant have had earlier transactions. The plaintiff has assisted the defendant by purchasing lands as and when requested by D.W.1 and the same is evident from Ex.A36 to Ex.A40. It is seen from the Ex.A17-CRP(MD)No.2753 of 2010 filed by the first defendant wherein it has been alleged that “it is submitted that subsequently, we commenced construction work for six buildings in our College campus to a total extent of 76000 sq.ft., so as to satisfy AICTE norms”. Whereas in the written statement, the defendants have stated that they have engaged new contractor to continue work and complete the work in respect of two buildings, within the stipulated time. The first defendant claims that he had engaged third party for alleged completion of construction of the three buildings covered under Ex.A1 to Ex.A3, which according to the defendant was abandoned by the plaintiff.



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

Admittedly, the date of alleged abandonment has not been stated anywhere. In the written statement, there is no mention about any name of the contractor, who is said to have completed the construction.

27. In order to support the case of the first defendant with regard to third party contractor, one Murugesan has been examined as D.W.2. However, whose name has not been mentioned in the written statement. In the chief examination of D.W.2, he states that he was given the job of mason and centering related work between last week of November 2008 and 30.12.2010. The allegation that the so called third party contractor, said to be D.W.2, completed construction before the approval in 2009 itself is not accepted one. D.W.2 deposed that the construction materials would be purchased and given to him. D.W.2 admits that he has no juniors or engineer and he does not know what is the extent of building constructed by him in square feet. In support of construction said to have been carried out through D.W.2, Ex.B1 to Ex.B56 have been marked. It is seen from the records that those documents were not filed along with written statement. A report of the Advocate Commissioner filed in CRP.(MD)No.2734 of 2010 has been marked as Ex.A18. The

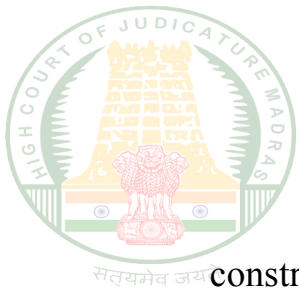


AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

defendant has not filed any objection to the Advocate Commissioner's report. A perusal of Ex.A18 shows details of construction made in the building. According to the plaintiff, as per Ex.A18 clearly records the construction made by the plaintiff. D.W.1 in his cross-examination, admits that the contents of Advocate Commissioner's report are correct. The first defendant trust has admitted breach of payment of 20% advance even as on date of Ex.A1 to Ex.A3. The defendant cannot take advantage of their own wrong. On the other hand, the plaintiff has completed its part of obligation under Ex.A1 to Ex.A3.

28.It is pertinent to mention that Ex.A1 to Ex.A3 agreements are admitted by the defendants. The plaintiff had originally filed the suit in O.S.No.392 of 2010 on the file of the Sub Court, Nagercoil, for bare injunction, restraining the defendant Trust from engaging any other contractor. Thereafter, based on the cause of action for recovery of dues under Ex.A1 to Ex.A3, the suit in O.S.No.124 of 2012 has been filed. Admittedly, the first defendant has not paid the amount of Rs. 1,68,27,160/- as on date of Ex.A1 to Ex.A3, as on 29.08.2008 with regard to 20% of payment shall be made at commencement of



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

construction work. In cross examination, D.W.1 states that the plaintiff had agreed that Rs.55,00,000/- as advance is sufficient. In this regard, D.W.1 has not placed any material before the trial Court. An argument was made as to why the plaintiff continued work without any payment from the first defendant. D.W.1 admits the non-payment of 20% of advance amount and the plaintiff has marked documents to show that the plaintiff and the first defendant had earlier transaction in Ex.A36 to Ex.A40 and the plaintiff had no reason to doubt the bonofides of the first defendant at that time.

29.In view of the above, it is clear that the plaintiff has proved the claim of the money under Ex.A1 to Ex.A3, on the other hand, the first defendant trust, who claims that he engaged third party to complete the construction, failed to prove the same. The initial burden lies on the plaintiff is proved. The defendant has not proved the specific allegation of completion of construction only till plinth level.

30.The learned Senior Counsel appearing for the plaintiff would submit that the plaintiff specifically pleaded that he is entitled to the suit



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

claim along with interest under “doctrine of unjust enrichment”. The transaction covered under Ex.A1 to Ex.A3 is a commercial transaction of construction, therefore, the interest rate may be enhanced at the rate of 12% per annum. The learned Senior Counsel to strengthen his contentions has relied upon the judgement of Hon'ble Supreme Court of India reported in 1997 (10) SCC 681 in ***Mahesh Chandra Bansal Vs. Krishna Swardoop Singhal*** to show that as regards interest pendent lite the main part of sub Section (1) of Section 34 of the Code of Civil Procedure prescribes that interest has to be awarded at a reasonable rate. At this juncture, it is relevant to refer the Section 34 of the Code of Civil Procedure, which reads as follows:-

34. Interest— (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit :



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

[Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I.—In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 (5 of 1970).

Explanation II.—For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.]

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.

31.It is relevant to cite judgment of the Hon'ble Supreme Court of India reported in **(2009) 11 SCC 60** in **C.K.Sasankan Vs. Dhanalakshmi Bank Ltd.**, wherein it has been held about the scope and application of



AS.(MD)Nos.53 of 2019 & 174 of 2021

WEB COPY

Section 34 of the Code of Civil Procedure, according to the provisions of Section 34, interest is to be awarded at a reasonable rate and on the principle amount. Although amount of interest from the date of filing of the suit, till the date of decree and thereafter, till realization is in the discretion of Court, as is confirmed by use of the word “may” in Section 32, but such discretion has to be exercised by Court properly, reasonably and on sound legal principles and not arbitrarily and while doing so the Court is also to consider the parameters, scope and ambit of Section 34 CPC. The Hon'ble Supreme Court, in a case of ***Rampur Fertiliser Ltd Vs. Vigyan Chemicals Industries***, reported in ***(2009) 12 SCC 324***, has held that “in absence of any agreement or statutory provision or a mercantile usage, interest payable can be only at the market rate and such interest is payable upon establishment of totality of circumstances justifying exercise of such equitable jurisdiction. In ascertaining the rate of interest the Court of law can take judicial notice both inflation as also fall in bank rate of interest. The bank rate of interest both for commercial purposes and other purposes has been the subject matter of statutory provisions”.



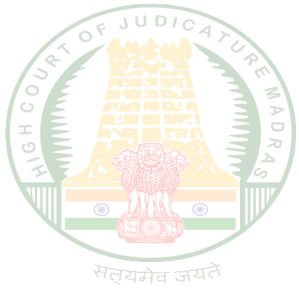
WEB COPY

32.In Ex.A1 to Ex.A3 construction agreements, there is no clause mention about if any party violates the terms of agreement, then, the party aggrieved would entitle the commercial rate of interest at 12% or more, where there is no specific clause in the agreement, the plaintiff is not entitled for 12% interest as claimed in his plaint. The reasonable rate of interest for the period the suit was pending and subsequent interest at 6% per annum has been decreed by the Court below, on considering the entire evidence on the case, does not require any interference by this Court.

33.In view of the above discussions, we are of the view that there is no reason to interfere in the impugned judgment and decree passed by the Court below. There is no merit in these appeals and the same are liable to be dismissed. The points are answered accordingly.

34.In the result,

- i)first appeal in A.S.(MD)No.53 of 2019 is dismissed,
- ii)first appeal in A.S.(MD)No.174 of 2021 is also dismissed and



AS.(MD)Nos.53 of 2019 & 174 of 2021

iii)the judgment and decree dated 28.04.2018 passed in O.S.

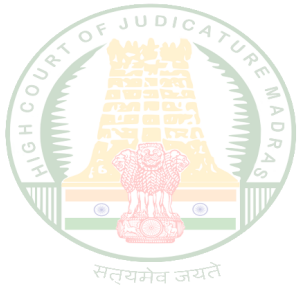
No.124 of 2012 on the file of the District Judge, Kanyakumari District at
Nagercoil is hereby confirmed. There shall be no order as to costs.

(G.R.S., J.) & (M.J.R., J.)
24.04.2025

NCC : Yes / No
Index : Yes / No
gns

To

The District Judge, Kanyakumari District at Nagercoil.



WEB COPY



AS.(MD)Nos.53 of 2019 & 174 of 2021

G.R.SWAMINATHAN,J.
and
M.JOTHIRAMAN, J.

gns

Pre-Delivery Judgement made in
A.S.(MD)Nos.53 of 2019 &
174 of 2021

24.04.2025